No. 87-634

Supreme Court, U.S.
FILED
NOV 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CHARLES V. MEADOWS and GEORGE HARRIS,
Plaintiffs and Cross-Petitioners,

VS.

THE DOMINICAN REPUBLIC and
INSTITUTO de AUXILIOS y VIVIENDAS,
Defendants and Cross-Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SANFORD JAY ROSEN
COUNSEL OF RECORD
BARBARA Y. PHILLIPS
SUSAN S. FIERING
ROSEN & PHILLIPS
155 Montgomery Street
8th Floor
San Francisco, CA 94104
Telephone No. (415) 433-6830
Attorneys for Cross-Respondents

QUESTIONS PRESENTED

Whether the Ninth Circuit erred in affirming on the merits the findings of facts and determination of law by the United States District Court for the Northern District of California that defendants' motion for relief from a default judgment under Rule 60(b)(1) and (4) of the Federal Rules of Civil Procedure was "timely."

LIST OF PARTIES

Defendants-Petitioners are the Government of the Dominican Republic and the Instituto de Auxilios y Viviendas, a separate and independent juridical entity from the Dominican Republic. Plaintiffs-Respondents are Charles Meadows and George Harris, two individuals. Mr. Meadows is now deceased.

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Cross Respondents (defendants and appellants below) respectfully oppose the Cross Petition for a Writ of Certiorari addressed to the issue of the timeliness of defendants' Rule 60(b)(1) and (4) motion in the United States District

Court for the Northern District of California. The Cross Petition is frivolous and constitutes an effort to persuade the Court that a lurking timeliness issue presents a reason for this Court to deny defendants' Petition for Writ of Certiorari in No. 87-454 on purported grounds of "judicial economy." Cross Petition at 2.

COUNTER STATEMENT OF FACTS

The complaint in this case was filed in the United States District Court for the Northern District of California on December 29, 1980. (CR. 1) Jurisdiction was asserted under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq. The defendants entered no appearance until April 10, 1985, at which time a special appearance was entered. (CR.56, 57) From 1980 until that date, ex parte

proceedings occurred in the district court and the Ninth Circuit.

The district court entered the default judgment that is the subject of these proceedings on May 30, 1984. Plaintiffs apparently sent an unsigned copy of the default judgment to defendants by registered mail on September 4, 1984, and it was received sometime thereafter. (CR. 60 at ¶ 8.)

On February 15, 1985, a copy of the signed default judgment was mailed to defendant, registered mail, return receipt requested. On March 8, 1985, pursuant to plaintiffs' request to the United States Department of State, the United States Embassy in Santo Domingo served the default judgment on the Dominican Republic. (CR. 60) On April 10, 1985, through United States counsel, the defendants made a "special

appearance" and moved to vacate entry of the default judgment under Rules 55(c) and 60(b)(1) and (4), Fed. Rules Civ. P., on the grounds that "(4) the judgment is void..." because the District Court lacked both personal and subject matter jurisdiction under Article III of and the Fifth Amendment to the Constitution of the United States, and the FSIA. (CR. 56, 57) Defendants also moved to set aside the default judgment on grounds of "(1) mistake, inadvertence, surprise, or excusable neglect...." Plaintiffs had to that date undertaken no efforts even to initiate collection proceedings pursuant to the FSIA, 28 U.S.C. § 1609 et seq.

The District Court found that, on all the facts, defendants' motion to set aside the default judgment was "timely" for the purposes of considering whether the defendants had acted out of "mistake,

inadvertence, surprise or excusable neglect" under Rule 60(b)(1). Meadows, see Appendix to Cross Petition (hereinafter Cross Pet. App.) at 65, 628 F. Supp. at 608. The District Court also held that the motion to set aside the default judgment, on the grounds that it is void because the District Court lacked personal or subject matter jurisdiction under Rule 60(b)(4), was timely. Cross Pet. App. at 37, 628 F.Supp. at 603. The District Court nevertheless held that defendants were not entitled to have the default judgment set aside.

The Ninth Circuit affirmed the District Court's findings and holdings in all respects. (As to the timeliness issues see Meadows, Cross Pet. App. at A10 to A12, 817 F.2d at 520-21, where the Court of Appeals also correctly held that

6"there is no time limit on a Rule 60(b)(4) motion to set aside a judgment as void."

In their Petition for Writ of Certiorari (No. 87-454), Defendants present the following five questions that concern the Ninth Circuit's decision affirming the District Court's refusal to set aside the default judgment:

1. In determining whether jurisdiction exists over a foreign sovereign under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), which permits jurisdiction to be asserted only when the cause of action is based on acts that cause a direct effect in the United States, may a court consider the general diplomatic and commercial contacts of the sovereign

with the United States that are wholly unrelated to the cause of action?

2. May a court, consistent with due process, interpret the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq., to permit the exercise of jurisdiction over a foreign sovereign based on the contacts of the sovereign with the entire United States rather than the forum state?

3. May a court find subject matter jurisdiction under the "direct effect" clause of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), solely on the basis of a promise to pay a commission somewhere in the United States?

4. Upon a timely motion to set aside a default judgment, may a court refuse to consider whether a foreign sovereign is juridically separate from an independent governmental entity, when the question of juridical separateness determines the existence of jurisdiction over the sovereign under the Foreign Sovereign Immunities Act, 28 U.S. §§ 1602 et seq.?

5. May a Court ignore the fact of a defendant's foreign sovereignty and the strength of that sovereign's defense to the action in deciding whether to set aside a default judgment entered against a foreign sovereign and a juridically separate entity?

Questions 1 through 4 involve Defendants' contentions below that the default judgment "was void." There is no time limit for bringing a motion under Rule 60(b)(4) on this ground. Question 5, which assumes arguendo that the juridical separateness issue is not-jurisdictional, is the only question presented in the Petition that involves the District Court's authority under Rule 60(b)(1) to set aside a default judgment on grounds of "excusable neglect". Under Rule 60(b) timeliness may be an issue only as to that question.

REASONS FOR DENYING THE CROSS PETITION

First, there is no significant issue of law worthy of this Court's review arising from the lower courts' determination of timeliness. Sup.Ct. Rule 17. The Cross Petition was interposed only to present to this Court the erroneous proposition that "A ruling adverse to Defendants on the timeliness issue would effectively moot review of all other issues raised in defendants' Petition for Writ of Certiorari, thereby promoting judicial economy." Cross Petition at 2.

This assertion is plainly false. As Rule 60(b)(4) itself provides no time limit for moving to set aside a default judgment on the grounds that "the judgment is void." Cross Pet. App. at A-99 to A-101.

Both the Ninth Circuit and the District Court correctly held that to the extent that defendants' motion to set aside the default judgment raises U.S. Constitution Article III issues, as a matter of law the motion to set aside cannot have been untimely. Jurisdictional issues can be raised at any time, before any court. Meadows, Cross Pet. App. at A-10 to A-12, 817 F.2d at 520-21.

Questions 1,2,3, and 4 in defendants' Petition for Writ of Certiorari (No. 87-454) Petition at i to iii (quoted supra at pp. 6-8), 10 to 33 without a doubt raise jurisdictional questions. Only Question 5 would be pretermitted if defendants' motion to set aside the default judgment under Rule 60(b)(1) was untimely. Petition at iii, 34 to 38.

Second, The District Court properly found the facts on which to determine the timeliness of defendants' motion to set aside the default judgment under Rule 60(b)(1), Fed. Rules Civ. Pro. See Cross Pet. App. at A-65, 628 F.Supp. at 608. These findings were reviewed and affirmed by the Ninth Circuit. Cross Pet. App. at A-10 to A-12, 817 F.2d at 520-21. As there are no extraordinary circumstance, these findings are not now subject to review by this Court. See Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 217 n.5 (1985); National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85, 98 n.15 (1984), on remand 601 F. Supp. 307 (D.C. Okla. 1984). But cf. Pennzoil v. Texaco, 481 U.S. ____, 107 S.Ct. 1519, 95 L.Ed.2d 1, 19 (1987), relying in part on the fact that both the

district and appellate courts found that the Texas trial court had the power to consider constitutional challenges to the enforcement provisions of a state court judgment.

Third, the Ninth Circuit and the District Court each properly applied the correct standards under Rule 60, Fed.R. Civ. Pro. to determine the issue of timeliness even under Rule 60(b)(1). These courts certainly have not abused their discretion in holding that defendants' motion was timely under Rule 60(b)(1). Cross Pet. App. A-37, 628 F.Supp. at 603. Further, plaintiffs have shown no conflict between the Ninth Circuit and other circuits as to the correct standards for determining timeliness under Rule 60(b)(1), or with

respect to application of those standards.

Indeed, plaintiffs seem to rely most heavily in their Cross Petition on Ninth Circuit decisions holding that motions to set aside default judgments can be and were untimely even though made within a year of entry. See Cross Petition at 30, 33, 36 to 37 relying on Ashford v. Steuart, 657 F.2d 1053 (9th Cir. 1981); Yanow v. Weyerhauser Steamship Co., 274 F.2d 274 (9th Cir. 1959); and Stafford v. Russell, 220 F.2d 853 (9th Cir. 1955). This reliance demonstrates both that there is no conflict among the circuits (as opposed conceivably to one within the Ninth Circuit) and that timeliness issues under Rule 60(b)(1) are so fact intensive and case specific as not to raise in this case an important unresolved issue of federal law that has

not been but ought to be resolved by this Court. Nor did the Ninth Circuit's decision violate any binding precedent of this Court. There are no grounds, therefore, for granting the Cross Petition. See S.Ct Rule 17.

CONCLUSION

For the foregoing reasons the Cross Petition for Writ of Certiorari is frivolous. See 28 U.S.C. §§ 1911 & 1912; Sup.Ct. Rule 49.2. It should be denied.

Respectfully submitted,

SANFORD JAY ROSEN
(Counsel of Record)
For Cross Respondents
(Defendants and
Appellants Below)

DATED: November 13, 1987